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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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In the Matter of Implementation of the	)	
Local Competition Provisions in the	)	CC Docket No. 96-98
Telecommunications Act of 1996	)	
	)	
Interconnection Between Local Exchange	)	
Carriers and Commercial Mobile Radio	)	CC Docket No. 95-185
Service Providers	)	

REPLY COMMENTS OF U S WEST, INC.

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October 17, 1997

## TABLE OF CONTENTS

### Page

SUMMARY .....	ii
I. ALLOWING UNBUNDLED SHARED OR DEDICATED TRANSPORT TO BE USED AS A LOW-COST SUBSTITUTE FOR ACCESS SERVICE WOULD RESULT IN REGULATORY ARBITRAGE.....	2
II. THE TELECOMMUNICATIONS ACT OF 1996 MAINTAINS A CLEAR DISTINCTION BETWEEN ACCESS SERVICE AND UNBUNDLED NETWORK ELEMENTS .....	5
III. THE COMMISSION IS REQUIRED TO MAINTAIN SUFFICIENT ACCESS REVENUES UNTIL IT IMPLEMENTS AN EXPLICIT UNIVERSAL SERVICE SUPPORT MECHANISM .....	9
IV. REQUIRING UNBUNDLED NETWORK ELEMENTS TO BE USED IN THE PROVISION OF LOCAL EXCHANGE SERVICE FURTHERS THE COMMISSION'S GOAL OF INCREASED LOCAL COMPETITION.....	10

## SUMMARY

U S WEST, Inc. ("U S WEST") agrees with the majority of commenters that the Federal Communications Commission ("Commission") should require unbundled shared or dedicated transport facilities to be used in the provision of local exchange service, not as a low-cost substitute for access service. The inevitable result of allowing interexchange carriers ("IXCs") to obtain service that is identical to access, but at a significantly reduced price, would be regulatory arbitrage – IXCs would simply convert their existing access service to unbundled network elements solely to avoid paying the implicit universal service support contained in existing access charges. The Commission can prevent this arbitrage opportunity by applying its existing restriction on the use of unbundled local switching to unbundled shared or dedicated transport facilities.

At its core, permitting unbundled network elements to be used as a substitute for access service would be fundamentally inconsistent with the Commission's access reform plan, which envisions gradual reductions in access charges to rates that would exist in competitive markets, and its universal service plan, which delays implementation of an explicit universal service support mechanism until the year 1999. Until the Commission removes the implicit universal service support contained in access charges and gives incumbent local exchange carriers ("LECs") the ability to provide access services at competitive rates, it cannot permit IXCs to obtain low-priced access under the pretense of

obtaining shared or dedicated transport as unbundled network elements.

The Commission is compelled by the Telecommunications Act of 1996 ("1996 Act") to maintain a clear distinction between interstate access service and unbundled network elements used in the provision of local exchange service. The fact that the 1996 Act expressly preserves the Commission's authority over access charges and assigns responsibility for the prices of unbundled network elements to the states proves that they were created to facilitate local competition – they were never intended to serve as a low-cost substitute for access service. The Eighth Circuit's decisions interpreting the interconnection provisions of the 1996 Act provide further support for U S WEST's position.

In addition, an unbundled network element rule that allows IXCs to engage in widespread avoidance of universal service support would be contrary to Section 254(b)(5) of the Communications Act of 1934, as amended, which requires that universal service support be "sufficient" and "predictable." If universal service support can easily be avoided through unbundled network element substitution, then it is neither "sufficient" nor "predictable."

Finally, when unbundled network elements are used in the provision of local service to end users, real competition in the local exchange market can be promoted. In contrast, providing a mechanism for IXCs to obtain a low-cost substitute for access and to avoid universal service support does nothing to promote legitimate competition.

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**REPLY COMMENTS OF U S WEST, INC.**

U S WEST, Inc. ("U S WEST") hereby files these reply comments in connection with the Federal Communications Commission's ("Commission") Further Notice of Proposed Rulemaking in the above-captioned docket.<sup>1</sup> U S WEST agrees with the majority of commenters that requesting carriers should not be allowed to use unbundled dedicated or shared transport facilities, in conjunction with unbundled switching, to originate or terminate interstate toll traffic to customers for whom that requesting carrier does not also provide local exchange service.<sup>2</sup>

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<sup>1</sup> In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295, rel. Aug. 18, 1997 ("Further Notice of Proposed Rulemaking"), appeals pending sub nom. Southwestern Bell Telephone Company v. FCC, Nos. 97-3389, et al. (8<sup>th</sup> Cir.).

<sup>2</sup> See, e.g., Association for Local Telecommunications Services ("ALTS") Comments at 2-3, 9; National Exchange Carrier Association, Inc. ("NECA") Comments at 2-4,

I. ALLOWING UNBUNDLED SHARED OR DEDICATED TRANSPORT TO BE USED AS A LOW-COST SUBSTITUTE FOR ACCESS SERVICE WOULD RESULT IN REGULATORY ARBITRAGE

The issue here is a simple one – the Commission should require unbundled shared or dedicated transport facilities to be used in the provision of local exchange service, not as a low-cost substitute for access service.<sup>3</sup> As ALTS stated in its comments, no party has demonstrated or even taken the position that the same network function could somehow have an appreciably different cost structure for access traffic as compared to local traffic.<sup>4</sup> Yet the interexchange carriers (“IXCs”) that filed comments in this proceeding are effectively seeking to obtain service that is identical to access, but at a significantly reduced price. The inevitable result of a rule that allows the expanded use of unbundled shared or dedicated transport as a substitute for access would be regulatory arbitrage of existing Part 69 access services.<sup>5</sup>

If permitted to do so, IXCs would simply convert their existing access service to unbundled network elements to avoid paying the implicit universal service

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6; Sprint Corporation (“Sprint”) Comments at 4; Time Warner Communications Holdings Inc. (“Time Warner”) Comments at 2, 11.

<sup>3</sup> U S WEST continues to maintain that the Commission’s recent decision to create a shared transport unbundled network element is unlawful. Rather than seeking reconsideration of this issue, U S WEST and others have appealed the Third Order on Reconsideration in the Eighth Circuit and U S WEST has requested a stay pending judicial review.

<sup>4</sup> ALTS Comments at 7.

<sup>5</sup> ALTS Comments at 7-8; BellSouth Corporation, et al. (“BellSouth”) Comments at 2; United States Telephone Association (“USTA”) Comments at 8.

support contained in existing access charges. For example, MCI Telecommunications Corporation ("MCI") is already attempting to convert a number of its special access connections from U S WEST's interstate access tariff rates to unbundled element rates. Any such request is premature to the extent that it constitutes an attempt to sidestep the Commission's access charge regime, given that the purpose of the instant rulemaking proceeding is to determine whether unbundled dedicated transport can replace access.<sup>6</sup> U S WEST urges the Commission not to allow IXCs to utilize unbundled network elements as a substitute for the access services provided by both incumbent and competitive local exchange carriers ("LECs") for the sole purpose of avoiding universal service contributions.

As many parties recognized, the Commission can prevent this arbitrage opportunity by applying its existing restriction on the use of unbundled local switching to unbundled shared or dedicated transport facilities.<sup>7</sup> The Commission has already held that a requesting carrier purchasing the local loop or local switching as an unbundled network element cannot offer access service to end users

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<sup>6</sup> While the Commission did not specifically raise the issue of special access in its Further Notice of Proposed Rulemaking, a requesting carrier that seeks to substitute unbundled transport for special access also should be required to provide both access and local exchange service. An IXC that uses special access for the sole purpose of transporting its interexchange traffic directly to an end-user customer is not competing in the local exchange market and thus should not be allowed to obtain such transport as an unbundled network element.

<sup>7</sup> Ameritech Comments at 17; Bell Atlantic Telephone Companies ("Bell Atlantic") Comments at 5; GTE Service Corporation, *et al.* ("GTE") Comments at 13; NECA Comments at 3; Time Warner Comments at 4-5; USTA Comments at 11.

for whom the requesting carrier does not also provide local exchange service.<sup>8</sup> If requesting carriers are allowed to purchase shared or dedicated transport as an unbundled element for the sole purpose of originating or terminating interstate access traffic, then they would be able to accomplish indirectly what they are prohibited from doing directly – namely, converting their existing access service to low-cost unbundled network elements. For that reason, the Commission should require that unbundled shared or dedicated transport facilities be used in the provision of competitive local exchange service.

At its core, allowing unbundled shared or dedicated transport to be used interchangeably with access would be fundamentally inconsistent with the Commission's access reform plan, which envisions gradual reductions in access charges to rates that would exist in competitive markets, and its universal service plan, which delays implementation of an explicit universal service support mechanism until the year 1999.<sup>9</sup> In adopting these reform plans, the Commission rejected the IXCs' position that it immediately implement forward-looking rates for access, recognizing that such a sudden decrease in access revenues "could prove highly disruptive to business operations."<sup>10</sup> Clearly, a requirement that the

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<sup>8</sup> In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd. 15499, 15679 ¶ 357 (1996) ("Interconnection First Report and Order"), Order on Reconsideration, 11 FCC Rcd. 13042, 13049 ¶ 13 (1996).

<sup>9</sup> ALTS Comments at 8-9; Ameritech Comments at 4-5; NECA Comments at 2; Sprint Comments at 4-5.

<sup>10</sup> In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line



functional equivalent of access be made available immediately at forward-looking rates would be incompatible with the Commission's implementation of access and universal service reform over a three-year transitional period. Further, although the Commission itself has recognized that "the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge," this price rebalancing has yet to occur.<sup>11</sup> Therefore, until the Commission removes the implicit universal service support contained in access charges (replacing it with explicit support or rebalanced rates) and gives incumbent LECs the ability to offer access service at competitive rates (or at least rates that match unbundled network element prices), it cannot permit IXC's to obtain low-priced access under the pretense of obtaining shared or dedicated transport as an unbundled network element.

## II. THE TELECOMMUNICATIONS ACT OF 1996 MAINTAINS A CLEAR DISTINCTION BETWEEN ACCESS SERVICE AND UNBUNDLED NETWORK ELEMENTS

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U S WEST also supports the position taken by many commenters that the Commission is compelled by the Telecommunications Act of 1996 ("1996 Act") to maintain a clear distinction between interstate access service and unbundled

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Charges, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, FCC 97-158, ¶¶ 45-46, rel. May 16, 1997, appeals pending sub nom. Southwestern Bell Telephone Company v. FCC, Nos. 97-2618, et al. (8<sup>th</sup> Cir.).

<sup>11</sup> Interconnection First Report and Order, 11 FCC Rcd. at 16012 ¶ 1033.

network elements used in the provision of local exchange service.<sup>12</sup> A number of parties, such as AT&T Corp. ("AT&T") and MCI, cite Section 251(c)(3) of the Communications Act of 1934, as amended (the "Act"), for the proposition that unbundled network elements must be provided to them for any use whatsoever.<sup>13</sup> However, nothing in 251(c)(3) limits the Commission's ability to require that requesting carriers offer local exchange service in addition to access as a condition for obtaining local switching or transport as unbundled network elements. Moreover, by focusing exclusively on Section 251(c)(3), these parties conveniently ignore the fact that the overall statutory framework of the 1996 Act draws an unmistakable distinction between access service and unbundled network elements. Simply stated, interconnection is a local service, while access service is interstate in nature and subject to the Commission's jurisdiction.

When read in context, it is apparent that Section 251(c) of the Act establishes unbundled network elements and interconnection as complementary mechanisms for facilitating local exchange competition. Unbundled network elements were never intended to eviscerate the Commission's current access charge regime found in Part 69 of its rules or to deprive the Commission of pricing authority over interstate access. To the contrary, Congress expressly preserved the existing access charge regime and the Commission's exclusive jurisdiction over access reform in

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<sup>12</sup> Ameritech Comments at 3; Bell Atlantic Comments at 3; BellSouth Comments at 9; NECA Comments at 5-6.

<sup>13</sup> AT&T Comments at 4; Competitive Telecommunications Association ("CompTel") Comments at 4-5; MCI Comments at 3-4; KMC Telecom Inc. ("KMC") Comments at

Section 251(g) of the Act.<sup>14</sup> There would be no reason for this provision if Congress intended to allow IXCs to avoid universal service contributions by converting their existing access service to unbundled network elements. Such a rule would lead to the virtual disappearance of access and render meaningless the Commission's ongoing reform of its access charge regime.

In addition, the 1996 Act expressly preserves the Commission's authority over interstate access services and rates under Section 201 of the Act while, at the same time, giving the states authority over the pricing of unbundled network elements.<sup>15</sup> If the Commission were to allow unbundled shared or dedicated transport facilities to replace access, then it would effectively be surrendering its jurisdiction over interstate access rates under Section 201. Further, this jurisdictional transfer would contravene Section 2(b) of the Act by effectively giving the states authority over interstate access rates and forcing states to permit bypass of intrastate access charges.

The Eighth Circuit's recent decisions interpreting Sections 251(c)(2) and (3) of the Act provide further support for clearly distinguishing between access and

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4-5; LBC Communications, Inc. ("LBC") Comments at 1; WorldCom, Inc. ("WorldCom") Comments at 2-3.

<sup>14</sup> As Ameritech demonstrated in its comments, the legislative history of Section 251(g) confirms that Congress intended to keep the existing access charge regime in place until the Commission promulgates new regulations. Ameritech Comments at 8.

<sup>15</sup> Compare 47 U.S.C. § 251(i) ("Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.") with 47 U.S.C. § 252(c)(2) (requiring a state commission to "establish any rates for interconnection, services, or network elements according to subsection (d)" of this section.).

unbundled network elements. In Iowa Utilities Board v. FCC, the Court noted that unbundled access provides a carrier with a “direct hookup to and extensive use of” an incumbent LEC’s local network, whereas exchange access is a service that is offered to IXC’s “without providing the interexchange carriers with such direct and pervasive access to the LEC’s networks and without enabling the IXC’s to provide local telephone service themselves through the use of the LEC’s networks.”<sup>16</sup> Thus, the Court distinguished between access and unbundled network elements based on the IXC’s ability to provide local exchange service.

Similarly, in Competitive Telecommunications Association v. FCC, the Court recognized the fundamental distinction between obtaining access to an incumbent LEC’s network as a long-distance service provider compared to a local service provider. Specifically, the Court explained that “[t]he IXC is seeking to use the incumbent LEC’s network to route long-distance calls and the newcomer LEC seeks use of the incumbent LEC’s network in order to offer a competing local service. Obviously, the services sought . . . are distinct.”<sup>17</sup> Thus, an IXC that requests access to an incumbent LEC’s network simply as a substitute for the incumbent LEC’s exchange access service and not to offer local exchange service is purchasing a distinct service from access to unbundled network elements.

The fact that the 1996 Act expressly preserves the Commission’s authority over access charges and assigns responsibility for the prices of unbundled network

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<sup>16</sup> Iowa Utilities Board v. FCC, 120 F.3d 753, 799 n.20 (8<sup>th</sup> Cir. 1997).

<sup>17</sup> Competitive Telecommunications Association v. FCC, 117 F.3d 1068, 1073 (8<sup>th</sup> Cir. 1997).

elements to the states proves that unbundled network elements were created to facilitate local competition – they were never intended to serve as a low-cost substitute for access service. At least until the prices of access service and interchangeable unbundled network elements have been rebalanced, the Commission must continue to draw this distinction as well.

**III. THE COMMISSION IS REQUIRED TO MAINTAIN SUFFICIENT ACCESS REVENUES UNTIL IT IMPLEMENTS AN EXPLICIT UNIVERSAL SERVICE SUPPORT MECHANISM**

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U S WEST agrees with numerous other parties that the Commission cannot price access service or its substitute on a forward-looking cost basis until it has implemented an explicit universal service support mechanism.<sup>18</sup> As the Commission has recognized, the subsidies contained in interstate access charges provide funding for universal service efforts.<sup>19</sup> Therefore, the practical effect of allowing unbundled shared or dedicated transport facilities to be used as a substitute for access would be to allow IXC's to engage in widespread avoidance of universal service support without providing an adequate recovery mechanism for such support.

The Commission's virtual elimination of an important source of universal service support before a new system of explicit support is in place would be contrary to Section 254(b)(5) of the Act, which requires that universal service support be

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<sup>18</sup> Ameritech Comments at 12-13; GTE Comments at 8-9; USTA Comments at 9-10. U S WEST fundamentally agrees with the Commission that market forces, not regulation, should be the primary driver of access rates.

“sufficient” and “predictable.”<sup>20</sup> If universal service support can easily be avoided through unbundled network element substitution (making it non-sustainable), then it is neither “sufficient” nor “predictable.” Therefore, consistent with the Commission’s universal service plan, access charges cannot be reduced to forward-looking cost until an explicit universal service recovery mechanism is firmly in place. Once universal service support is removed from access revenues, incumbent and competitive LECs should be given the pricing flexibility to provide access service at forward-looking rates.

#### IV. REQUIRING UNBUNDLED NETWORK ELEMENTS TO BE USED IN THE PROVISION OF LOCAL EXCHANGE SERVICE FURTHERS THE COMMISSION’S GOAL OF INCREASED LOCAL COMPETITION

U S WEST supports the position taken by both incumbent and competitive LECs that the Commission’s goal should be to ensure that facilities-based competitors enter the local exchange market.<sup>21</sup> When unbundled network elements are used in the provision of local service, real competition in the local exchange market can be promoted. In contrast, providing a mechanism for existing IXC to obtain a low-cost substitute for access and to avoid universal service support does nothing to promote legitimate competition.

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<sup>19</sup> In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, FCC 97-157, ¶ 11, rel. May 8, 1997, appeals pending sub nom. Texas Office of Public Utility Counsel v. FCC, Nos. 97-60421, et al. (5<sup>th</sup> Cir.).

<sup>20</sup> 47 U.S.C. § 254(b)(5).

<sup>21</sup> Time Warner Comments at 11-12; USTA Comments at 8-9.

AT&T and MCI argue that allowing unbundled shared or dedicated transport to be used as a substitute for access will reduce access rates, but they are conspicuously silent with respect to local service rates.<sup>22</sup> They also neglect to mention that this reduction in access rates would occur only because IXC's would be able to avoid universal service contributions. CompTel argues that requiring unbundled network elements to be used in the provision of local exchange service discriminates in favor of IXC's that enter the local market first.<sup>23</sup> But that is exactly the point. The Commission's rules for unbundled network elements should be designed to encourage local competition, not to reward IXC's that do not choose to compete in the local exchange market.

For these reasons, U S WEST supports the position of the majority of parties that shared or dedicated transport may be purchased as unbundled network

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<sup>22</sup> AT&T Comments at 6; MCI Comments at 6.


<sup>23</sup> CompTel Comments at 6-7.

elements only where the requesting carrier provides both access service and local exchange service to end-user customers.

Respectfully submitted,

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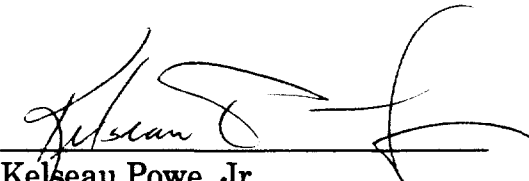
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October 17, 1997



## CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 17th day of October, 1997,  
I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST, INC.**  
to be served, via first class United States Mail, postage pre-paid, upon the persons  
listed on the attached service list.



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